92-1426

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1992

DONNIE RAYFORD TATE, Jr., CHEA TATE, BRANDI NICOLE TATE, DONNIE RAYFORD TATE, Sr., and KATHY MAE TATE,

Petitioners,

-against-

HAROLD M. COLE, FIRST STATE SERVICE CORP., an Arizona Corporation, and SIERRA VISTA LAND AND DEVELOPMENT COMPANY, a joint venture,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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February 26, 1993

QUESTION PRESENTED

In denying the appellant's petition for rehearing, did the panel majority fail to apply the substantive law of Arizona thereby creating a conflict between the decisions of the Ninth Circuit Court of Appeals and the Supreme Court of Arizona and ignoring the provisions of 28 U.S.C. §1652?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit are those in the caption (appellants in C.A. 90-16201) as well as Harold M. Cole, First State Service Corp., and Sierra Vista Land and Development Company (appellees). Dominic Troncale, DOM Construction, Herman Pate and Pate Construction were also parties (appellees) to the proceedings in the Ninth Circuit.

Petitioners are not seeking to have this Court review the appellate court's decision with regard to Troncale, DOM Construction, Pate, or Pate Construction. Therefore none are named as parties herein.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on December 2, 1992.

OPINIONS BELOW

The decision of the district court was issued on April 4, 1990 [36a][1]. The district court denied the Plaintiffs' Motion for Reconsideration on July 9, 1990 [34a]. The decision of the court of appeals was issued on June 26, 1992 [1a]. The petitioners' petition for reconsideration[2] and petition for rehearing with suggestion for rehearing en banc were denied on October 5, 1992 [11a] and December 2, 1992 [33a] respectively. All of these orders have been reproduced pursuant to Rule 33 of The Rules of the United States Supreme Court and are contained in the appendix to the instant petition.

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[1] Materials appearing in the Appendix to this petition will be referred to as ["__a"].

[2] Defendants/Appellees Dom Construction and Dominic Troncale also filed a petition for reconsideration which was denied on October 5, 1992. Dom has not pursued the appeals process any further.

BASIS FOR JURISDICTION

The Petitioners' Petition for Rehearing with Suggestion for Rehearing En Banc was denied on December 2, 1992. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254 (1) and 28 U.S.C. §2101(c). Additionally, for jurisdictional purposes, Petitioners also contend that this Court has granted such jurisdiction pursuant to its holding in Missouri v. Jenkins, 495 U.S. 33 (1990).

CONSTITUTIONAL, STATUTORY and REGULATORY PROVISIONS INVOLVED

TITLE 28, UNITED STATES CODE, §1652:

State Laws as Rules of Decisions

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

a. INTRODUCTION

On the afternoon of April 13, 1988, Donnie Tate, age 18 and a resident of the State of Arkansas, rode his motorbike to a series of man-made earth stockpile hills in an area known as "The Summit" which he had discovered and rode on just two days earlier. [C.R. 161, Statement of Facts, p.2][3]. Unbeknownst to him, just over the other side of the hill he was going to climb, a fifteen foot vertical cliff had been created just the day before by an excavator who left no warnings of the dangerous condition. Donnie climbed the hill and was unable to avoid falling off the other side

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[3] Items not included in the Appendix annexed hereto but which were in the record before the court of appeals will be referred to in the following manner: (1) items in the "Clerk's Record" will be denoted "C.R.___" followed, if appropriate, by the title of the document and the corresponding page number; (2) items which were presented to the court of appeals in the Excerpts of Record will be denoted "Excerpts of Record, p. ER-___."

where the cliff had been created and in the process broke his back and paralyzed his legs from the waist down. [C.R. 161, Statement of Facts, p. 2].

Pursuant to 28 U.S.C. 1332[4], the Petitioners filed suit against the landowners and developers of "The Summit" (Cole, Sierra Vista Land & Development, and First State Service Corporation) [C.R. 106]. A contractor (Herman Pate and Pate Contractors) and a subcontractor (Dominic Troncale and Dom Construction) who were believed to be the excavators of the hill who created the cliff, were later joined in the suit based on circumstantial evidence [C.R. 127, C.R. 147].[5]

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[4] Jurisdiction of the trial court (court of first instance) is noted here pursuant to Rule 14.1(i) of the Rules of The Supreme Court of the United States.

[5] Herman Pate and Pate Contractors were dismissed from the case during the appeals process via stipulation with the Petitioners.

The landowners and contractors moved for and were granted Summary Judgment on the basis of a "recreational user statute" (A.R.S. §33-1551) that gives immunity to landowners against recreational users who are injured in rural, open area environments. The contractors also moved for summary judgment on the basis that there wasn't enough evidence to link them to the actual excavators that negligently removed the dirt from the stockpile. These motions were granted.

On appeal, the court of appeals noted that the district court erroneously relied on Arizona's Recreational User Statute, A.R.S. §33-1551, in granting summary judgment to the landowners. However, a majority of the appellate court affirmed the grant of summary judgment to the landowners based on its interpretation of Arizona case law concerning the duty of a landowner to a trespasser and held that the owner of land owed no duty to trespassers for an "open and obvious condition"

that the landowners had no actual knowledge of. The appellate court reversed the grant of summary judgment to the defendant/appellee sub-contractor excavator and remanded the case back to the district court for further proceedings on the basis that a material question of fact existed whether certain documents inculpated them.

b. THE LAND

Originally, 410 acres were purchased to create a two phase residential development. The land was bisected and the western half became Phase I and was developed. The eastern half, Phase II, was left as bare land and was where the dirt stockpile was created from excess soil generated from the leveling of Phase I for residential buildings. Approximately 183 homes were located on Phase I. The excess dirt that was removed from Phase I was stored just on the other side, 200 yards from the housing development on Phase II, in an immense dirt stockpile of over five acres.

Thus, the dirt stockpile is 200 yards away from a main thoroughfare. Approximately 200 yards north of the stockpile lie another 30 homes and a quarter of a mile north of that development is an established residential section. The dirt stockpile is accessible directly from various roads. [C.R. 161, Statement of Facts, p. 3, no. 13; Excerpts of Record, p.ER-1]. In fact, the center of the city of Sierra Vista is only 1.75 miles north of the dirt stockpile. The city of Sierra Vista has a population of approximately 35,000 people. [C.R. 199, pp. 2-3]

c. THE DIRT STOCKPILE USE

Phase II of the development on which the 'dirt stockpile' was located was not developed as was envisioned and, in fact, continues to lay undeveloped. [C.R. 199, p.2]. The dirt stockpile became a recreational vehicle haven. Numerous complaints were made to the city of Sierra Vista by residents bordering the pile about the noise generated from motorcyclists and other recreational users. The dirt

stockpile became so well traveled by these users, that pathways on it were actually defined by their use. [C.R. 161, Affidavit of Rosemary Neuman; Excerpts of Record, p. ER-3; C.R.161, C.R. 199, Appendix III; Excerpts of Record, p. ER-7].

At the same time, the developers of the land were eager to dispose of the dirt stockpile and were giving away the landfill for the asking since they were marketing the raw acreage in Phase II for sale [C.R. 199, pp. 2-3]. As many as 75 to 80 truckloads of earth or 1,000 cubic yards a day were excavated and removed from the stockpile. [C.R. 161, p.5]. This created a noise and pollution nuisance that continued over a period of months, causing the residents bordering the dirt pile to complain to the police about the dirt and noise of the excavation and transportation of earth; the police told the residents nothing could be done. The residents' regularly complained to the City of Sierra Vista in the months, weeks,

and days before the accident. One resident, Mrs. Neumann, asked police why couldn't a fence be placed around the stockpile. [C.R. 161, Affidavit of Rosemary Neuman; Excerpts of Record, p. ER-3]. No fences were erected to indicate the area was private land. [C.R. 161, p.7] Signs which were once up and torn down years before, were never replaced. [C.R. 161, p.7]. It was the interfacing of the recreational use with the excavation that caused the unreasonably dangerous conditions.

d. THE LANDOWNERS PROMISE TO KEEP SAFE AND BEAUTIFUL

The owners of the land, Harold Cole and First State Service Corporation, jointly entered into the partnership "Sierra Vista Land & Service Co." [C.R. 161, Statement of Facts, p.3, no. 10] and lobbied the local governmental entities to obtain permission to develop "The Summit". These developers paraded their experience of having already created 60 other model communities in the Southwest to support their

goal of a balanced, planned community. [C.R. 199, Appendix I, pp. 3-10; Excerpts of Record, p. ER-10].

The owners of "The Summit" had employed an onsite manager of the developments beginning in 1983 whose office was only one and a half miles from the dirt stockpile [C.R. 161, p.3] and who was supposed to be on site everyday. [C.R. 161, Statement of Facts, p.3; Excerpts of Record, p. ER-18]. The site manager, Gerald Logue, indicated that he knew of the recreational vehicle use at "The Summit" [C.R. 161, p. 3; Excerpt of Record, p. ER-20] since it was common knowledge that the stockpile was frequented by dirt bike riders [C.R. 161, p.3; Excerpts of Record, p. ER-22], but he never required the contractors to sign in, comply with obtaining excavation permits from the City of Sierra Vista nor follow any subject protocols in the removal of the earth. [C.R. 161, Statement of Facts, p.4; Excerpts of Record, p. ER-24, p. ER-26, p. ER-28]. He did not examine

the premises after excavation had been completed since he had never established any procedure for the removal of dirt from the stockpile; he did not keep records of the contractor's to whom he had given permission to remove dirt from the stockpile; he did not know what appropriate safety precautions were to be used when dirt was excavated from the stockpile in order to prevent unreasonably dangerous conditions from developing. The site manager also never received any instructions from Mr. Cole or First State Service on how the stockpile was to be managed. [C.R. 161, Statement of Facts, p.4; Excerpt of Record, p. ER-30, p. ER-33, p. ER- 35, p. ER-37]. Landowner Harold Cole testified that the dirt stockpile was so close to the houses that he couldn't see how it could be used for recreational purposes anyhow!! [C.R. 146; Excerpt of Record, p. ER-40]. Officer Burns of the Sierra Vista Police Department testified that, prior to Donnie Tate's accident, he had observed other unsafe

and improperly sloped mounds and dangerous cliffs which had been left after prior excavations on the stockpile. The landowners allowed vertical cliffs and unstable conditions to be created and failed to control access to the stockpile site. [C.R. 161, Statement of Facts, p.6; Excerpts of Record, p. ER-50].

e. THE ACCIDENT

Donnie Tate was temporarily in Sierra Vista visiting and staying with his girlfriend, Chea Schraer, her mother and stepfather, Mr. John Miller. Chea's mother had come to Fort Huachuaca on temporary military assignment from Hot Springs, Arkansas. [C.R. 276, Exhibit A (Deposition of Donnie Tate), pp. 12-13]. Both Donnie Tate and John Miller liked to ride dirt motorcycles and on April 11th they discovered the dirt stockpile at the Summit. They safely drove their motorcycles numerous times over the stockpile and over the hill which was later to be excavated. Neither Donnie Tate nor Mr. Miller were aware at the time that the land

they were on was private property. Indeed, Mr. Miller, an ex-police officer, indicated that had they been aware that the land they were on was private property, they would not have ridden their motorcycles on it. Moreover, it appeared to Miller that the stockpile was to be used for motorcycling purposes. [C.R. 161, Statement of Facts, p. 3].

No signs were posted on the land indicating private ownership and there was not even a fence around the limited area of the stockpile. [C.R. 161, supra., no. 15; Excerpt of Record, p. ER-1]. When Donnie Tate returned to the stockpile on April 13, 1988, he used Coronado and Summit Boulevards, traveling through the subdivision of homes, and proceeded only 200 yards from where the road ended to the hill.

f. THE EXCAVATION

The day after Petitioner Donnie Tate had ridden around The Summit stockpile, and without his knowledge, earth was incorrectly gouged from the bottom of one of the stockpile hills

which he had ridden over, instead of being gradually pushed from the top of the hill down. This created a 15 foot vertical drop. A contractor who had himself excavated other parts of the dirt pile,, indicated that whoever excavated the dirt from the location at which the accident occurred had done so in a substandard fashion. The excavation was not properly sloped, warning flags were not placed, a basin was not created nor staked with ribbons and the slope was not shored up upon removing the dirt. [C.R. 161, Statement of Facts, pp. 5-6; Excerpts of Record, p. ER-42, p. ER-44, p. ER-47]. This particularly unreasonably dangerous condition was created the day after Donnie had first ridden over the hills and one day before the accident occurred. Donnie Tate did not foresee any changes in the hill. [C.R. 161, Statement of Facts, p. 2, nos. 1, 2, 6, and 7].

REASONS FOR GRANTING WRIT

I. THE MAJORITY PANEL OF THE COURT OF APPEALS MISAPPLIED THE ARIZONA CASE LAW ON THE DUTY OWED BY A LANDOWNER TO A TRESPASSER OR LICENSEE IN VIOLATION OF 28 U.S.C. §1652.

a. The Panel Majority Misapplied the Arizona Law on Trespassers In Violation of 28 U.S.C. §1652

In Arizona, "[w]hen a landowner knows or ***has reason to know*** that trespassers come upon his property, he cannot, without liability, maintain a dangerous artificial condition on his property when he also has reason to believe that the trespasser will not discover the dangerous condition or realize its risk." Webster v. Culbertson, 158 Ariz. 159, 162, 761 P.2d 1063 (en banc)(1988)(emphasis added). Additionally, determination of whether a landowner has "reason to know" is a highly ***fact intensive*** determination. Webster, *id.*, at Ariz. 163. Moreover, the "actual knowledge" by the landowner of a dangerous condition on his property or of the presence of trespassers upon it ***is not*** equivalent to a landowners "reason to

know." The landowner need only to have a "reason to know" of the dangerous condition or of the proximity of trespassers to the condition for liability to attach. Webster, *id.*, at Ariz. 163. These are the basic principles of Arizona law that court of appeals misconstrued to deny the Petitioners' their day in court.

The Petitioners strenuously argued to the court of appeals that the evidence presented numerous questions of fact that, if Donnie Tate's status upon the land was indeed that of a trespasser, the landowners of The Summit stockpile ***had sufficient reason to know or anticipate*** his presence at The Summit and that he, or any other trespasser for that matter, would not discover or be aware of any dangerous conditions upon the stockpile resulting from the continual unsupervised and unregulated excavation activities that were occurring. ***SEE* Appellants' Reply Brief to Landowners, pp. 12-17; Appellants' Petition for Reconsideration,**

pp. 3-5; Appellants' Petition for Rehearing With Suggestion for Rehearing En Banc, pp. 3-10.

The Petitioners presented evidence that the landowners created the dirt stockpile, they encouraged other contractors to remove or excavate dirt from this stockpile and anticipated that this would be done, and they did not regulate or supervise the removal of this dirt. No fences were erected around the stockpile nor were any signs or warnings maintained that indicated the stockpile was private property or that it would be excavated. Moreover, the Petitioners' presented the testimony of Police Officer Burns that, prior to Tate's accident, he had witnessed improperly sloped mounds and dangerous cliffs which had been left after prior excavations on the stockpile. The petitioners also presented evidence that the landowners and the entire community of Sierra Vista, Arizona was aware that the stockpile was used by recreational motorcyclists.

Indeed, when this matter was initially brought before the trial court through the motion for summary judgment, the trial court itself noted that: "[a]s to the trespasser part of it, there's probably some questions about that that would preclude summary judgment as a trespasser." ***See*** C.R. 228, p.35, lines 18-20. On the appeal, the dissenting opinion of Justice Reinhardt points out the numerous facts contained in the record which presented questions of fact concerning the landowner's reason to know, as per the Arizona Supreme Court's holding in Webster, *id.*, of Tate's presence on the stockpile and of the dangerousness presented to individuals of the excavation activities conducted on the stockpile. [14a-15a].

Yet, in face of all these substantial questions of fact raised by the evidence, the panel majority simply stated in one paragraph that:

> ...the landowners had no reason to know of the existence of this cliff, since it had only just been formed. There is no evidence in the record of other, similar conditions which should have put the owners on notice of the probable existence of such dangers...

The panel majority indicated that this interpretation of the facts was supported by Webster, *id.* [17a].

Besides being dead wrong on the issue whether testimony by another that cliffs were created prior to the accident gave the landowners "reason to know," the panel's decision is also contrary to the established federal law on grants of summary judgment. Under United States v. Diebold, Inc., 369 U.S. 655, 654 (1962), "[o]n summary judgment, the inferences to be drawn from the underlying facts ... **must be viewed in the light most favorable to the party opposing the motion**," (emphasis added). "Summary judgment will not lie if ... the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The questions of fact raised by the evidence present genuine issues which a jury could resolve in the Petitioners' favor. Moreover, this matter should go to a jury under the theory proclaimed in Webster, especially when considering that determination of whether a landowner "should have known" is a "highly fact intensive determination." **SEE** P.16, ***infra***; [18a-19a]. The Petitioners contend, as did the dissent [22a], that the majority's reading of Webster is too constricted and creates limitations on a landowner's duty to a trespasser under Arizona law where none exist. Under 28 U.S.C. §1652, the laws of the states shall be regarded as the rules of decisions in civil actions in the federal courts. This principle was articulated by Justice Brandeis in Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Its purpose is to maintain uniformity of decisions within each state. King v. Order of United Commercial Travelers, 333 U.S. 153, 157 (1948).

It has been steadfastly followed by the federal courts. However, the Ninth Circuit's affirmance of the trial court's grant of summary judgment, is a deviation from this accepted principle. If allowed to stand, this deviation will not only serve to muddy the waters of Arizona law but will also deprive the Petitioners of their right to present their case to a jury of their peers.

b. The Panel Majority Misapplied the Arizona Law of A Landowner's Duty To Licensees.

On appeal, the Petitioners argued that not only did the landowners owe a duty to Donnie Tate as a trespasser, if that is what his status on the land was determined to be, but that he could also be defined as a invitee or a licensee and that the landowners failed in their duty to Tate under these categories as well.

In it's one paragraph determination of a landowner's duty to a trespasser, the panel majority simply inferred that, by mis-citing

and applying Shannon v. Butler Homes, Inc., 102 Ariz. 312, 316, 428 P.2d 990, 994 (1967)(landowner's duty to a social guest or invitee), a landowner's duty to a licensee consists of nothing more than to warn such individuals of hidden dangers that the landowner had reason to know existed on the premises. The Panel did not discuss or determine whether Tate was a licensee. [5a-7a]. The Dissent points out that Shannon does not stand for the proposition that this is a landowner's only exclusive duty, but that the duty only existed under the particular facts of that case and that violation of that duty in Shannon, was sufficient to impose liability. [22a-23a]. Even the panel majority acknowledged that Tate could be a licensee on the premises. [5a-7a]; **SEE ALSO** DISSENTING OPINION AT [23a, n.4]. Moreover, there is a material question of fact that, as noted by the dissent, "...whether the landowner's knowledge of and tacit consent to the continued use of the mound by dirtbikers made Tate a licens-

ee..." [26a]. This is indeed established Arizona law -- habitual acquiescence in trespass may constitute a licensee and tolerance may be so pronounced as to be tantamount to permission. ***See*** Payne v. Greenberg Construction, 130 Ariz. 338, 636 P.2d 116 (1981); Barry v. Southern Pacific Company, 64 Ariz. 116, 166 P.2d 825 (1946). Since there are questions of material fact dealing with licensee status, determination of the duty owed by the landowners to Donnie Tate goes beyond the application of Webster.

Petitioners agree with Judge Reinhardt's dissent and contend that the panel majority's failure to review Petitioner Tate's status as a licensee deprived the Petitioners of a determination of an issue which, by the fact situation presented and the applicable Arizona law, would have precluded the grant of summary judgment to the landowners, allowing the Petitioners' case to go to a jury. Moreover, this failure further demonstrates that the

panel majority failed to apply the substantive and applicable Arizona law in violation of 28 U.S.C. 1652 and the holding of this Court expressed in Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

c. The Panel Majority, In Reviewing the Applicable Facts, Invaded The Province of the Jury by Affirming the Grant of Summary Judgment Contrary to Established Arizona Law.

As previously noted, by the law enunciated in Webster, determination of the applicability of a landowner's "reason to know" is a highly fact-intensive choice -- a question that only the jury should answer. ***INFRA*** at p.16. The panel majority ignored this important proposition of Arizona law. Another legal proposition of Arizona law that was ignored was the rule the determination of whether a condition is open and obvious is a question for the jury and not one for a court to decide.

In its one paragraph affirmance of the grant of summary judgment, the panel majority wrote that:

> ...the condition was not hidden or concealed, a necessary element if landowner liability is to attach. [6a].

In an accompanying footnote, the panel went on to state:

> The dissent argues that the landowners had reason to know of the possibility of the creation of dangerous conditions on the dirt stockpile. Landowner liability, however, also requires a finding that the cliff was a hidden or concealed condition. See Restatement (2d) Torts §§ 335, 337, 341. ***A fifteen-foot cliff does not constitute a hidden or concealed condition.*** [6a, n.1](emphasis added).

This finding by the panel is contrary to Arizona law. **THIS IS A QUESTION FOR THE JURY TO DETERMINE!**

In Markowitz v. Arizona Parks Board, 146 Ariz. 352, 356, 706 P.2d 364 (1985)(en banc) (duty of owner of recreational area to invitee), the Arizona Supreme Court held that "...where the possessor should foresee that the condition is dangerous despite its open and obvious nature, ***neither the obvious nature nor the plaintiff's knowledge of the danger is***

conclusive,"(emphasis added). In Newman v. Sun Valley Crushing Company, (No. 1 CA-CV 90-0649, Arizona Court of Appeals, Division One, Department D, July 2, 1992)(review granted on February 2, 1993), the Court of Appeals, relying upon Markowitz, *id.*, wrote that "... [w]hether a condition is obvious is normally a ***fact question*** which should not be resolved by summary judgment." *slip.op. at p.15.* Moreover, in Shannon v. Butler Homes, Inc., 102 Ariz. 312, 318, 428 P.2d 990 (1967)(en banc), a case cited by the majority in support of their position, the Arizona Supreme Court found "that what constitutes a hidden peril will, in borderline cases, be a question of fact for the jury."

The question as to whether Donnie Tate, returning to the stockpile just two days after it was a "complete" hill, should have somehow seen the cliff which was hidden from view is, under Arizona law, a question for fact for the jury to determine. The panel majority failed

to apply 28 U.S.C. 1652 by basing their disposition of this matter on ***their own*** determination of the obviousness of the cliff condition which Donnie Tate drove over.

II. Petitioners' Writ Should Be Granted As The Court of Appeals' Correct Application of Arizona Law Is "Doubtful" Under the Erie R. Co. v. Tompkins Doctrine.

This Court has held that a petitioner's writ for certiorari may by granted where it is doubtful that the court of appeals applied the doctrine expressed in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198 (1956). Petitioners' contend that the majority's opinion is so doubtful an application of Arizona law that this Court should grant their Petition for Writ of Certiorari.

As a result of appellate court's ruling, the landowners have been told that they may maintain dangerous conditions on artificially created pieces of his property without ***ANY*** responsibility toward individuals who come into

contact with these conditions and suffer injury. In essence, the reviewing federal appeals court has thus told the landowners that it is acceptable to turn a blind eye to the consequences arising from the negligent maintenance of land regardless of the responsibilities imposed on the landowners by the laws of the State of Arizona.

The appellate court's ruling has further impact -- it is telling a paraplegic young man living in Arkansas attempting to raise a young daughter on his own, that the landowners owed absolutely no duty to him or anyone else to maintain The Summit stockpile in a safe manner. It is telling him that federal courts have turned a blind eye to his injuries and it tells him that the landowners have a free rein to maintain their property in any way they see fit, regardless of the consequences.

This Court has the power to change these results. Grounds exist for this Court to grant the Petitioners Writ for Certiorari. The court

of appeals erroneously applied existing Arizona law in determining Donnie Tate's status as a trespasser and refused to recognize or make a determination, under Arizona law, of Tate's status as a licensee. These applications of the laws of Arizona are more then doubtful -- they are simply incorrect! And they have precluded the Petitioners from presenting their claim to a jury of their peers.

III. Conclusion

Accordingly, for the reasons stated herein, the Petitioners respectfully request that this Honorable Court grant their Petition for Writ of Certiorari.

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APPENDIX

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM[1]

No. 90-16201
D.C. No. CV-89-218-TUC-RMB

DONNIE RAYFORD TATE, JR.; CHEA TATE,

Plaintiffs-Appellants

v.

HAROLD M. COLE; FIRST STATE SERVICE CORPORATION, an Arizona corporation; SIERRA VISTA LAND AND DEVELOPMENT COMPANY, a joint venture; DOM CONSTRUCTION COMPANY, a sole proprietorship; DOMINIC TRONCALE,

Defendants-Appellees.

Nos. 90-16350
91-15048
D.C. No. CV-89-218-TUC-RMB

DONNIE RAYFORD TATE, JR.; CHEA TATE,

Plaintiffs-Appellants

v.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3

HAROLD M. COLE; FIRST STATE SERVICE CORPORATION, an Arizona corporation; SIERRA VISTA LAND AND DEVELOPMENT COMPANY, a joint venture; DOM CONSTRUCTION COMPANY, a sole proprietorship; DOMINIC TRONCALE; PATE CONTRACTORS, INC., An Arizona Corporation; HERMAN PATE; CITY OF SIERRA VISTA, ARIZONA,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Richard M. Bilby, District Judge, Presiding
Argued and Submitted February 11, 1992
San Francisco, California
Filed June 26, 1992

Before: SCHROEDER, REINHARDT, and KLEINFELD, Circuit Judges.

Plaintiff-Appellant Donnie Tate became a paraplegic as the result of an accident which occurred while he was riding his motorcycle on the dirt stockpile known as "the Summit." The accident occurred on a hill that had, unbeknownst to Tate, been excavated since his previous visit. The excavation had left a fifteen foot vertical cliff which Tate fell over after he cycled to the top of the hill.

The Summit was owned by defendants-appellees Cole, Sierra Vista Land Company, and First State Service Corporation ("the landowners"). It consisted of mounds of dirt that had been created when the landowners developed an adjacent tract of land and stored the excess dirt on the Summit. The Summit was commonly used by dirtbikers. It was also used as a source of landfill material. The defendants-appellees Dom Construction and Dominic Troncale acting as subcontractors for Pate Contractors and Herman Pate (collectively, "Dom") were engaged in using landfill from the Summit in the course of a construction project at nearby Fort Huachuca.

Donnie Tate, Brandi Nicole Tate, Donnie Rayford Tate, Sr., and Kathy Mae Tate filed this action in district court alleging that the landowners and Dom were liable for Donnie Tate's injuries. The district court granted summary judgment to the landowners on the ground that the Summit was recreational use

"premises" under A.R.S. §33-1551, which creates immunity from tort liability for owners of such premises. The district court awarded summary judgment to Dom on the basis of the same statute and also on the basis that there was no triable issue of fact to establish that Dom was responsible for creating the cliff. In addition, the district court awarded Rule 11 sanctions against plaintiffs' attorney for pursuing frivolous claims for purposes of delay in the third amended complaint. Plaintiffs appeal from all three rulings.

Plaintiffs correctly contend that the district court should not have relied upon Arizona's Recreational Use Statute. That section defines "premises" as "agricultural, range, mining or forest lands, and any other similar lands." Arizona Revised Statute §33-1551. Size, use, remoteness, and "naturalness" are the factors which determine whether land constitutes "premises" under the statute. See Walker v. City of Scottsdale, 163 Ariz. 206,

213, 786 P.2d 1057 (Ct. App. 1989). The statute is to be construed narrowly. Bledsoe v. Goodfarb, 823 P.2d 1264, 1270 (Ariz. 1991). Here while the tract is relatively large, 200 acres, it is adjacent to a residential development, and its principal recreational use by motorcyclists is due to the wholly artificial creation of the dirt mounds. It is not the type of remote, natural premises used for recreational purposes that is envisioned by the Arizona statute.

That determination does not dispose of the appeal, for we must affirm if there is any basis in the record on which to support the district court's ruling. Kruso v. International Tel. & Tel. Corp, 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 110 S. Ct. 3217 (1990). The landowners contend that Donnie Tate is a trespasser or a licensee to whom under Arizona law the landowners owed a duty at most to warn of hidden dangers which the landowners had reason to know were on the

premises. See Webster v. Culbertson, 158 Ariz. 159, 161, 761 P.2d 1063, 1065-66 (1988)(trespasser); Shannon v. Butler Homes, Inc., 102 Ariz. 312, 316, 428 P.2d 990, 994 (1967)(invitee). In this case, the landowners had no reason to know of the existence of this cliff, since it had only just been formed. There is no evidence in the record of other similar conditions which should have put the owners on notice of the probable existence of such dangers. If an unreasonably dangerous condition was negligently created in this case, the negligence was on the part of whatever excavator hauled the dirt away. Furthermore, the condition was not hidden or concealed, a necessary element if landowner liability is to attach.[1] Accordingly, summary judgment was

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[1] The dissent argues that the landowners had reason to know of the possibility of the creation of dangerous conditions on the dirt stockpile. Landowner liability, however, also requires finding that the cliff was a hidden or concealed condition. See Restatement (2d) Torts §§ 335, 337, 341. A fifteen-foot cliff does not

properly granted in favor of the landowners.

We turn next to the liability of Dom. Because we have concluded that the Summit was not "premises" within the meaning of the Recreational Use Statute, the question is whether there was a genuine issue of fact as to whether Dom was responsible for the cliff. We conclude that there is such an issue.

There is considerable evidence from which to infer that Dom moved dirt from the Summit on April 12. Dominic Troncale state in his deposition that Dom obtained all soil for the Fort construction project at the Summit. In order to bring in dirt for the Fort project, the contractor had to submit soil samples for testing and the only sample Dom submitted came from the Summit. The contractor's own log stated that Dom had made a delivery "on site" that day.

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constitute a hidden or concealed condition.

Troncale's deposition explained that notation by stating that "on-site" means that the dirt came from one part of the Fort to another. He stated in his deposition that Dom stopped excavation at the Summit on March 22. However, Steven Thompson, Director of the Department of Engineering and Housing at Fort Huachuca, stated that dirt was never stored on one part of the Fort and then moved to another, that it would be economically infeasible to do so, and that he would have to have given his permission and never had. His testimony was corroborated by Jim Glaze, a retired safety engineer with construction experience, who stated it would be inefficient to stockpile dirt in one area and then move it to another area.

In light of these contradictions, we must conclude that there were genuine issues of material fact in this record, and that the district court should not have granted summary judgment in favor of Dom. The circumstantial

evidence adduced by the plaintiff was sufficient for one to infer that Dom was responsible for the dirt removal that led to the creation of the cliff. There is no evidence of any other contractor or dirt remover having been at the site.

We turn finally to the matter of sanctions. The record of what was before the district court with respect to sanction motions is not entirely clear. The district court awarded sanctions on the basis that the claims in the Third Amended Complaint were frivolous and pursued from a desire to needlessly delay the case. It appears that at least some of the invited motions for sanctions were based upon an allegedly frivolous claim for loss of consortium which was contained only in the Second Amended Complaint. This court has concluded that there exists a triable issue of fact with respect to the claims against Dom and concludes further that the claims against the landowners cannot be considered frivolous.

There is no indication that any of the claims were made in bad faith. We conclude that the district court abused its discretion in awarding sanctions against the plaintiffs' attorney. See Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990)(en banc).

The judgment in favor of the landowners in appeal No. 90-16201 is AFFIRMED. The judgment in favor of Dom Construction and Dominic Troncale is REVERSED and the matter REMANDED FOR FURTHER PROCEEDINGS. The order of sanctions in appeal Nos. 90-16350 and 91-15048 are to be VACATED.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORDER

No. 90-16201
D.C. No. CV-89-218-TUC-RMB

DONNIE RAYFORD TATE, JR.; CHEA TATE,

Plaintiffs-Appellants

v.

HAROLD M. COLE; FIRST STATE SERVICE CORPORATION, an Arizona corporation; SIERRA VISTA LAND AND DEVELOPMENT COMPANY, a joint venture; DOM CONSTRUCTION COMPANY, a sole proprietorship; DOMINIC TRONCALE,

Defendants-Appellees.

Nos. 90-16350
91-15048
D.C. No. CV-89-218-TUC-RMB

DONNIE RAYFORD TATE, JR.; CHEA TATE,

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v.

HAROLD M. COLE; FIRST STATE SERVICE CORPORATION, an Arizona corporation; SIERRA VISTA LAND AND DEVELOPMENT COMPANY, a joint venture; DOM CONSTRUCTION COMPANY, a sole proprietorship; DOMINIC TRONCALE; PATE CONTRACTORS, INC., An Arizona Corporation; HERMAN PATE; CITY OF SIERRA VISTA, ARIZONA,

Defendants-Appellees.

Filed October 5, 1992

Before: SCHROEDER, REINHARDT, and KLEINFELD, Circuit Judges.

The memorandum disposition filed June 26, 1992, page [8a] first full paragraph is amended as follows:

> Dom's brief argues that the notation "on site" meant that the dirt came from one part of the Fort to another. Troncale stated in his deposition that Dom stopped excavating at the Summit on March 22. However, Stephen Thompson, Director of the Department of Engineering and Housing at Fort Huachuca, stated that it would be unusual for dirt to be stored on one part of the Fort and then moved to another and that he would normally have to have given his permission for such a thing. He apparently gave no such permission to Dom. Thompson's testimony is bolstered by Jim Glaze, a retired safety engineer with construction experience, who stated that it would be inefficient to stockpile dirt in one area and then move it to another.

Judge Reinhardt's attached dissent is ordered filed.

A majority of the panel has voted to deny both petitions for rehearing. Judge Reinhardt would grant Tate's petition. The petitions are denied.

Appellants' request for fees is denied.

Re: Tate v. Cole, No. 90-16201

Filed October 5, 1992

REINHARDT, Circuit Judge, concurring in part and dissenting in part:

I agree with most of what my colleagues have said in this case. I agree with the majority that the district court improperly granted summary judgment to the landowners and Dom on the basis of Arizona's Recreational Use Statute and concur in its analysis of that statute and its application in the present case. I agree that the grant of summary judgment to Dom should be reversed because there is a genuine issue of material fact regarding Dom's responsibility for the cliff that caused Tate's injuries. I also concur that the district court abused its discretion by awarding sanctions against the plaintiffs' attorneys. My sole disagreement is with the conclusion that the district court's result was

right with respect to the landowners even thought its reasoning was wrong. I believe that the decision to grant summary judgment in favor of the landowners was in error in all respects. In my view, summary judgment was inappropriate under Arizona law.

The landowners knew that a huge dirt pile was located on their property. They knew that a variety of individuals were removing portions of that mound of dirt and explicitly authorized at least some of them to do so. The landowners did not supervise the removal of the dirt, require the parties that removed it to follow any procedures or rules with respect to their actions, or examine the condition of the mound after the removal of large quantities of dirt. Moreover, there is at least a genuine issue of material fact regarding whether the landowners knew or should have known that the mound was used by recreational dirtbikers. The plaintiffs presented evidence that Gerald Logue, the site manager at the Summit, knew about recre-

ational vehicle use on the mound. They also presented evidenced that use of the mound by dirtbikers was "common knowledge". In addition, they presented evidence that the dirtpile was crisscrossed by numerous identifiable paths created by the dirtbikes and that several complaints had been made to the city of Sierra Vista by neighboring residents concerning the bikers' use of the dirt pile. The majority believes that, as a matter of law, Arizona does not recognize liability of the landowners in such circumstances. I am convinced that it is mistaken.

The majority's one-paragraph explanation of its ruling regarding the landowners' liability cites only two cases in support of its holding: Webster v. Culbertson, 158 Ariz. 159, 761 P.2d 1063, 1065 (1988), and Shannon v. Butler Homes, Inc., 102 Ariz. 312, 316, 428 P.2d 990, 994 (1967). See Disposition at [6a]. My colleagues contend that these cases stand for the proposition that because Donnie Tate

was a trespasser or licensee, the landowner's sole duty was "to warn of hidden dangers which the landowners had reason to know were on the premises." Id. at [6a]. The majority finds summary judgment to be appropriate because it believes that the landowners did not have actual knowledge or "reason to know" of the presence of the cliff.[1] I believe, for two

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[1] The majority also suggests that liability cannot be imposed because the cliff was not "hidden or concealed". See id. at [6a, n.1]. An artificial condition need not be "hidden" or "concealed" in order to impose liability on the landowners: all that is required is that there by "reason to believe that [Tate] will not discover it or realize the risk involved". **Restatement (Second) Torts** § 337 (1965); see also id. § 335 (same); id. § 334 (same); Webster, 761 P.2d at 1064-65 (reversing summary judgment in favor of a landowner who placed a barbed wire fence across an open wash that subsequently injured an individual "who saw the fence when he and his horse were approximately ten feet from it but . . . was unable to stop his horse in time"). Tate and numerous other dirtbikers regularly traversed the mounds over identifiable paths at great speed: it is eminently reasonable to believe that, especially given the numerous hills on the mound over which visibility was exceedingly limited, they would not -- as Tate did not -- discover a

reasons, that my colleagues are in error. First, I believe that there is a genuine issue of material fact concerning whether the landowners had "reason to know" about the cliff on their property and hence are subject to liability even under the "general rule" cited by my colleagues. Second, I believe that the majority ignores alternate bases for liability that expand the duties of landowners beyond the general rule it relies upon.

I believe that under Arizona law the Tates have clearly established a genuine issue of material fact regarding whether the landowners "knew or should have known" about the dangerous cliff[2] -- by virtue of their failure to super-

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cover a newly-created cliff as they approached it from the backside until it was too late to avoid serious bodily injury.

[2] The fact that the contractor, and not the landowner, created the cliff, see Disposition at [6a], is irrelevant: liability is imposed on the landowner regardless of who actually was responsible for the formation of the dangerous condition on the land.

vise the removal of the dirt; their failure to inspect the mound after large quantities of dirt were removed; their decision to impose no standards on, or procedures to be followed by, the parties who removed the dirt from the mound; and by virtue of the fact that they should have concluded that the unsupervised, uninspected, and standardless removal of large amounts of dirt from the pile was likely to result in the creation of a physical hazard. In reviewing a motion for summary judgment, all reasonable inferences must be drawn in the light most favorable to the non-moving party. See T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 630-32 (9th Cir. 1987). To defeat such a motion, plaintiffs need only present evidence from which a jury might return a verdict in their favor. See id. That rule is especially important in cases of the type before us because under Arizona law a determination of whether a landowner "should have know" of a

particular danger "is a highly fact-intensive determination." Webster, 761 P.2d at 1067.

Given the facts before us, the district court's grant of summary judgment was improper. The landowners knew that contractors were removing large quantities of dirt from the mound. Without the creation of any standards for that removal, it was reasonable to expect that the contractors would remove the dirt in the cheapest or easiest way possible -- including removing large amounts of dirt from the most accessible section of the pile, thereby creating an inherently dangerous cliff. Without supervision by the landowners, it was reasonable to expect that such a cliff would go unnoticed and unrestored. The fact that the landowners had no reason to know that the particular cliff that injured Donnie Tate had been created is irrelevant: the information that they had was sufficient to put them on notice that there was a likelihood that one or more cliffs would be created, and to impose on

them a duty both to prevent and warn of the probable existence of such cliffs -- duties that they failed completely to perform. See **Restatement (Second) of Torts** § 334 cmt.c (1965) ("The words 'should know' as used in the Restatement of this Subject imply that the person in question is not only required to draw a correct conclusion from the facts known to him, but also to ascertain the data necessary for drawing such a conclusion by a reasonable attention to and appreciation of the surrounding circumstances and, where adequate data cannot be thus obtained, by inspection or investigation.")[3]

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[3] Under Arizona law, plaintiffs need not demonstrate that "similar conditions", Disposition at [6a], had previously been formed on the land in order to establish that the landowners had "reason to know" that the standardless and unsupervised removal of large quantities of dirt might create a hazardous condition on their land. Moreover, the Tates did present evidence -- in particular, the deposition of Officer Burns -- that previous excavation had created cliffs and "sudden drop-off[s]" in the mound.

The present case is quite similar in relevant respects to an illustration in the Restatement of a "classical" case of landowner liability. See **Restatement (Second) of Torts** § 335 cmt. d (1965) That illustration depicts a landowner who knows that individuals habitually trespass on his land in an area close to an unfenced powerhouse -- just as here the landowners knew (or should have known) that dirtbikers habitually use the dirtpile. The landowner in the illustration nevertheless permits a concealed five-foot-high electric wire to become uninsulated -- just as here the landowners permitted a concealed cliff to be created in the mound. In the illustration, if a trespasser comes into contact with the electric wire and is injured, the rule is clear: "A [the landowner] is subject to liability". Id. I believe that the rule is the same here. The majority acknowledges that "there is no question that the conduct of the excavator who created this particular condition

was negligent and created an unreasonably dangerous condition." The landowners cannot escape responsibility for permitting this to occur merely by saying: we closed our eyes to what was occurring.

Moreover, the majority's holding that the sole duty of a landowner is to warn of hidden dangers which the landowners had reason to know were on the property is based on a misreading of Webster and Shannon. The majority's reading of those cases is far too constricted. It finds limitations where none exist. In fact, both cases noted only that the described duty existed and that a violation of that duty was sufficient to justify imposition of liability -- not that it was the exclusive duty of a landowner or the sole bases for liability. See Webster, 761 P.2d at 1065 (noting that § 337 of the Restatement is "an exception to, or modification of, this general rule"); Shannon 428 P.2d 994; see also Webster, 761 P.2d at 1067 (failing to reach the issue of the landowners'

duties under § 335 of the Restatement because it was not raised in appellant's opening brief); id. at 1065 (citing **Restatement (Second) of Torts** § 333 (1965) (entitled "General Rule" and establishing rule "except as stated in §§ 334-339")). Webster and Shannon therefore do not stand for the proposition relied upon by the majority, nor do they provide support for the finding that the landowners are immune from liability under Arizona law.[4] In fact, in both Webster and Shannon, the court reversed lower court's grants of summary judgment to the defendant. See Webster, 761

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[4] Moreover, Webster dealt only with the issue of duties owed to a trespasser, see Webster, 761 P.2d at 1065 n.3, while the majority admits that Tate may have been a licensee (to whom the landowners would have owed a higher duty of care). See Disposition at [5a]; see also infra at [5a-7a] (discussing licensee liability). Accordingly, Webster could not be determinative of the present case.

P.2d at 1067; Shannon, 428 P.2d at 996.[5]

I believe that there are several bases on which liability might be found under Arizona law. I will allude to them briefly.

First, the landowners might be liable under § 337 of the Restatement. Section 337 states that:

> "A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if
>
> (a) the possessor knows or has reason to of their presence in dangerous proximity to the condition, and
>
> (b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved."

Arizona explicitly follows that section of the Restatement. See Webster, 761 P.2d at 1066.

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[5] Given that result, the courts found no reason to elaborate on possible additional bases of liability. No language can be found in either case to preclude liability in situations not precisely analogous to either Webster or Shannon.

The principal question is whether the landowners "maintained" the cliff on their land. I believe that a strong argument can be made that they did. Section 335 of the Restatement also may provide a basis for liability. Although Arizona does not appear to have explicitly adopted the section, "[i]n the absence of law to the contrary, Arizona follows the Restatement." Webster, 761 P.2d at 1066; see Jesik v. Maricopa County Community College District, 125 Ariz. 543, 546, 611 P.2d 547, 550 (1980); MacNeil v. Perkins, 324 P.2d 211, 215 (1958). It states that

> "A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited areas of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land if (a) the condition (i) is one which the possessor has created or maintained and (ii) is, to his knowledge, likely to cause death or seriously [sic] bodily harm to such trespassers and (iii) is of such a nature that he has reason to believe that such trespassers will not discover it and (b) the possessor has failed to warm such trespassers of the condition and the risk involved."

Here again, the principal question is whether the landowners "maintained" the cliff on their property. Again, I believe it is reasonable to conclude that they did.

Finally, Section 341 of the Restatement may impose a basis for finding liability. Tate may have been a licensee and not merely a trespasser. There is genuine issue of material fact concerning whether the landowners' knowledge of and tacit consent to the continued use of the mound by dirtbikers made Tate a licensee. See Disposition at [5a] (noting that Tate may be a licensee). Section 341 describes the duties owed to licensees by landowners and is followed by Arizona. See, e.g. supra at [5a-7a] (noting general rule); Harris v. Buckeye Irr. Co., 642 P.2d 885, 887-889 (Ariz.App. 1982) (applying § 341). Section 341 states that:

> "A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, (a) he should expect that they will not discover or realize the danger, and (b) they do not know or have reason to know of the possessor's activities or the risk involved."

If Tate is held to be a licensee, he might well be entitled, after trial, to relief under Section 341.

I do not think that it is by any means clear that none of the above-mentioned additional bases for liability is applicable in the present case, nor does the majority identify any reason for not applying these alternate grounds. They all present circumstances precluding the issuance of summary judgment. In view of the fact that the majority is in error in concluding that the "general rule" precludes relief here and in view of the existence under Arizona law of other bases for relief, I would reverse the grant of summary judgment to the landowners and remand the

claims against them for further proceedings.[6]

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[6] The dissent was inadvertently omitted when the disposition was issued. Because the majority and dissenting opinions are now being reissued following the filing of petitions for rehearing, I note that the appellants call our attention to the recent opinion of Newman v. Sun Valley Crushing Co., CA-CV 90-0649 (Ariz. Ct. App. July 2, 1992), which strongly supports the views expressed herein.

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 90-16201
CT/AG#: CV-89-218-TUC-RMB

DONNIE RAYFORD TATE, JR.; CHEA TATE,

Plaintiffs-Appellants

v.

HAROLD M. COLE; FIRST STATE SERVICE CORPORATION, an Arizona corporation; SIERRA VISTA LAND AND DEVELOPMENT COMPANY, a joint venture; DOM CONSTRUCTION COMPANY, a sole proprietorship; DOMINIC TRONCALE,

Defendants-Appellees.

NO. 90-16350
CT/AG#: CV-89-00218-RMB

NO. 91-15048
CT/AG#: CV-89-00218-RMB

DONNIE RAYFORD TATE, JR.; CHEA TATE, husband and wife

Plaintiffs-Appellants

v.

FIRST STATE SERVICE CORPORATION, an Arizona corporation; DOM CONSTRUCTION COMPANY, a sole proprietorship; DOMINIC TRONCALE; PATE CONTRACTORS, INC., An Arizona Corporation; HERMAN PATE; CITY OF SIERRA VISTA, ARIZONA (a body politic)

Defendants-Appellees.

and

HAROLD HYAMS, Esq.

Real-Party-in-interest

APPEAL FROM the United States District Court for the District of Arizona (Tucson).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered June 26, 1992.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

OCT 19 1992
by: /s/ Don Lewis
Deputy Clerk

ORDER
FILED OCTOBER 21, 1992

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONNIE RAYFORD TATE, JR.; CHEA TATE,

Plaintiffs-Appellants

v.

HAROLD M. COLE; FIRST STATE SERVICE CORPORATION, an Arizona corporation; SIERRA VISTA LAND AND DEVELOPMENT COMPANY, a joint venture; DOM CONSTRUCTION COMPANY, a sole proprietorship; DOMINIC TRONCALE,

Defendants-Appellees.

USCA NO.: 90-16201
DC#: CV-89-218-TUC-RMB

USCA NO.: 90-16350
DC#: CV-89-00218-RMB

DONNIE RAYFORD TATE, JR.; CHEA TATE, husband and wife

Plaintiffs-Appellants

v.

FIRST STATE SERVICE CORPORATION, an Arizona corporation; DOM CONSTRUCTION COMPANY, a sole proprietorship; DOMINIC TRONCALE; PATE CONTRACTORS, INC., An Arizona Corporation; HERMAN PATE; CITY OF SIERRA VISTA, ARIZONA (a body politic)

Defendants-Appellees.

and

HAROLD HYAMS, Esq.

Real-Party-in-interest

USCA NO.: 91-15048
DC#: CV-89-00218-RMB

The mandate previously issued in these appeals is hereby RECALLED as having been issued prematurely.

FOR THE COURT:

Cathy A. Catterson
Clerk of Court

/s/ Don Lewis
By: Don Lewis
Deputy Clerk

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORDER

No. 90-16201
D.C. No. CV-89-218-TUC-RMB

DONNIE RAYFORD TATE, JR.; CHEA TATE,

Plaintiffs-Appellants

v.

HAROLD M. COLE; FIRST STATE SERVICE CORPORATION, an Arizona corporation; SIERRA VISTA LAND AND DEVELOPMENT COMPANY, a joint venture; DOM CONSTRUCTION COMPANY, a sole proprietorship; DOMINIC TRONCALE,

Defendants-Appellees.

Filed December 2, 1992

Before: SCHROEDER, REINHARDT, and KLEINFELD, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the

suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIVIL MINUTES - GENERAL

Civil Case No.: CIV 89-218-T-RMB
Date: 7-9-90
Title: Donnie Rayford Tate v. Harold M. Cole, et.al.

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Present:
Hon. Richard M. Bilby, Judge
Virginia Abeyta, Deputy Clerk
John Davis, Court Reporter

ATTORNEY(S) FOR PLAINTIFF(s)
Harold Hyams

ATTORNEY(S) FOR DEFENDANT(s)
Richard Kent
Kimble
Joseph Watkins

==========

PROCEEDINGS: Open Court

Hearing

Counsel make statements to Court.

Ordered, the Court shall treat Plaintiff's Motion for Clarification of Petition for Reconsideration as a Motion to Alter or Amend Judgment pursuant to 59(e) and is Denied. Plaintiff's appeal time starts this date.

Plaintiffs Motion for Reconsideration re: Landowner is Denied.

Motion for Summary Judgment by Dominic Troncale/Dom Construction is Granted.

Motion for Summary Judgment of Pate Contractors is Granted.

Copies issued to: Hyams, Kent, Kimble, Fauver, Watkins, Brogna, RMB.

ORDER
FILED APRIL 6, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CIV 89-218 TUC-RMB

DONNIE RAYFORD TATE)
)
Plaintiff,)
)
v.)
)
HAROLD COLE, et al.,)
)
Defendants.)
)

A.R.S. §33-1551 is Arizona's recreational use statute. 33-1551 provides "an owner, lessee or occupant of premises does not owe any duty to a recreational user to keep the premises safe for such use."

A.R.S. §33-1551 (B) defines "premises" as "agricultural, range, mining or forest lands, and any other similar lands which by agreement are made available to a recreational user..." The case of Walker v. Scottsdale, 48 Ariz.Adv.Rep. 28 (1989), discussed the type of land to which the recreational use statute

would apply, stating the types of land "normally are relatively large areas...located in thinly populated rural or semi-rural locales." The Walker Court further explains the property is often in a "natural, undeveloped state."

Clearly the 200 acres of undeveloped land where the accident took place falls within the statute's definition of "premises." Furthermore, Donnie Tate was unquestionably a recreational user within the meaning of the statute.

In light of the foregoing, IT IS HEREBY ORDERED Summary Judgment is GRANTED as to Defendants Cole, Sierra Vista Land and Development and First State Service Corporation.

DATED this 4 day of April, 1990.

/s/ Richard M. Bilby
RICHARD M. BILBY
United States District Judge

Supreme Court, U.S.
FILED
MAR 25 1993
OFFICE OF THE CLERK

No. 92-1426

In The

Supreme Court of the United States

October Term, 1992

DONNIE RAYFORD TATE, Jr.,
CHEA TATE, BRANDI NICOLE TATE,
DONNIE RAYFORD TATE, Sr.,
and KATHY MAE TATE,

Petitioners,

-against-

HAROLD M. COLE,
FIRST STATE SERVICE CORP.,
an Arizona Corporation, and
SIERRA VISTA LAND AND DEVELOPMENT
COMPANY, a joint venture,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

MICHAEL F. MCNAMARA, Esq.
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QUESTIONS PRESENTED

1. In a case of diversity jurisdiction, can there be a violation of the *Erie* doctrine and 28 USC § 1652 when the federal court applies the substantive law of the relevant state, simply because one party disagrees with the outcome?

2. Did petitioners fail to present specific facts from which a jury could reasonably conclude that the condition upon which the injury occurred was hidden and concealed, making summary judgment appropriate?

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Respondents respectfully pray that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Art. 18, Sec. 5 of the Constitution of the State of Arizona:

> Contributory negligence and assumption of risk.
>
> Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

Rule 10.1(a), Rules of Supreme Court: Considerations Governing Review On Writ of Certiorari.

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Rule 14.1(j), Rules of the Supreme Court

Content Of The Petition For A Writ Of Certiorari.

> .1. The petition for a writ of certiorari shall contain, in the order here indicated:

. . .

> (j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 10.

Rule 14.3, Rules of the Supreme Court

> .3 All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph .1(j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

REASONS FOR DENYING THE WRIT

The petition should be denied for two reasons: First, petitioners present no issue of federal law, since the Ninth Circuit complied with *Erie* by applying the law of Arizona. Second, the Ninth Circuit correctly decided the case on its merits, affirming the District Court's grant of summary judgment in favor of respondents based on Arizona law which generally does not hold a landowner accountable for injury to a trespasser.

I. No Issue of Federal Law

Rule 10.1(a), Rules of the Supreme Court, indicates that reason to grant a petition for writ of certiorari exists when a United States court of appeals "has decided a *federal* question in a way in conflict with a state court of

last resort." (emphasis added) There is no federal question in this case. Federal jurisdiction exists because of the diversity of citizenship of the parties. This is a personal injury claim based on state tort law. Petitioners themselves argue that the Ninth Circuit misapplied *Arizona* case law.

While by its own terms Rule 10.1 does not restrict the Court's discretion, petitioners' attempt to create a phantom federal issue should not go unchallenged. Petitioners correctly point out that state law controls the resolution of this case. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). A federal issue might exist had the Ninth Circuit refused to apply Arizona law, but the majority's memorandum decision reflects that it relied exclusively on Arizona law to affirm the judgment. There is no federal issue simply because petitioners disagree with the majority's conclusions and hope that the case would have been decided differently by the Arizona Supreme Court. The Ninth Circuit complied with *Erie* by applying the rules established by Arizona's lawmakers.

Petitioners cite *Missouri v. Jenkins*, 495 U.S. 33 (1990), contending that it somehow sets a precedent for the Court to issue a writ under the present circumstances. In *Jenkins*, the District Court ruled on issues dealing with desegregation in a public school system. The Court found that the District Court went too far in its rulings and thus failed to follow a rule of federal law – that local authorities have the primary responsibility for resolving the problems of desegregation. *Id.* at 51-52. *Jenkins* is therefore inapposite, as no such rule of federal law is at issue in the present case.

Petitioners also cite *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956), where the Court issued its writ because of a "doubtful application" of *Erie*. *Id.* at 200. In *Bernhardt*, the issue was enforcement of an agreement to arbitrate. The Court of Appeals deemed the enforceability of the agreement a procedural issue not governed by *Erie*. This Court disagreed, finding the issue to be substantive, and held that under the *Erie* doctrine state law should control whether the agreement was enforceable. In the present matter, petitioners attempt to create a federal issue by arguing that *Erie* was doubtfully applied, not because the Ninth Circuit failed to apply the law of Arizona, but because petitioners believe that the Ninth Circuit incorrectly applied the law of Arizona. This makes no sense. There is no doubt that the Ninth Circuit complied with *Erie* by applying Arizona law.

II. On the Merits

Petitioners argued to the Ninth Circuit that Donnie Tate was a trespasser at the time of his injury. As such, he was "lowest in the legal scale" and had no right to demand that respondents, the landowners, "provide [him] with a safe place to trespass;" Tate assumed the risk of what he might encounter and was "expected to look out for [him]self." Prosser and Keeton, *The Law of Torts*, § 58 at 393 (5th Ed. 1984).

"Ordinarily the duty of a landowner to a trespasser is not to willfully or wantonly injure him." *Moore v. Tucson Elec. Power Co.*, 761 P.2d 1091, 1092 (1988). Arizona, like the majority of states, is committed to the common law distinction among trespassers, licensees and invitees,

because the rules accompanying these entrant classifications give certainty and predictability to commercial and private legal relations. *Id.* at 1093. Inevitably, there are some exceptions to the general rules, but the further one strays from the general rules the weaker and less valuable the common law distinctions become.

Potentially applicable exceptions to the general rules controlling liability of a landowner to a trespasser or licensee are stated in *Restatement (2d) Torts* §§ 335, 337, 341. The Court of Appeals correctly stated that landowner liability under these exceptions requires a finding that the fifteen-foot cliff upon which Tate was injured was a hidden or concealed condition which Tate could not be expected to discover. Petitioners presented no evidence in the District Court from which one could reasonably make such a finding.

No such evidence is discussed in the petition; instead, petitioners concentrate on their argument that respondents had reason to know of the danger, a point not conceded by respondents which is irrelevant unless petitioners can establish that the cliff was hidden or concealed.

In support of their position that the cliff was hidden or concealed, petitioners do present, in lieu of evidence, a reference to briefs and petitions filed in the Court of Appeals. (see pp. 17-18 of Petition) This is a violation of Rules 14.1(j), 14.3, Rules of the Supreme Court, which require that all arguments in support of the petition be set forth in the body of the petition. Petitioners consider the arguments set forth in the Court of Appeals filings to

be specious. For that reason, and because those arguments referred to are not presented in the body of the Petition for Writ of Certiorari, in violation of the Court's rules, respondents will not address those arguments here.

Petitioners rely primarily on *Webster v. Culbertson*, 761 P.2d 1063 (1988), and argue that factual issues should have precluded summary judgment. In *Webster* the defendant landowner erected a four-strand barb wire fence across a desert wash that she knew was frequented by trespassers, including equestrians. The fence posts were obscured by brush, and the court characterized both the posts and the barb wire as "virtually invisible." The plaintiff rode his horse into the fence and suffered serious injuries. The Arizona Supreme Court simply determined that a reasonable jury could choose to accept plaintiff's contention that the landowner should have known that trespassers would not perceive the existing risk.

The present matter is entirely dissimilar. The condition upon which Tate injured himself was not virtually invisible, and the landowners had no reason to expect, even if they had known of the condition, that trespassers would not discover it and realize the risk involved. This case does not present a question of fact for the jury.

This case is very similar to *Watters v. Buckbee Mears Co.*, 354 N.W.2d 848 (Minn.App. 1984), an action brought by trespassers to recover for injuries sustained while "four-wheeling" on private land which had been used to mine gravel. Two passengers in the vehicle had previously been on the property for recreational riding. The trespassers drove up a hill and were injured when their vehicle went over a vertical drop. The court recognized

that exceptions to the general rule of no liability to trespassers require that the condition be concealed. The court enforced the general rule, stating the following: "An inspection, however brief, would have revealed the ledge on the other side. The danger was not concealed." *Id.* at 851. Likewise, in the present case, even a brief inspection by the trespasser Tate would have revealed the ledge upon which he was injured. The landowners are not responsible under Arizona law for Tate's injury.

Petitioners seem to argue that whether a condition is hidden or concealed is, in all cases, a question of fact that only a jury can decide. First, this argument ignores federal procedural rules. The party opposing a motion for summary judgment must "set forth specific facts showing that there is a genuine issue for trial." Rule 56, Federal Rules of Civil Procedure. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted). Petitioners fail to cite significantly probative evidence from which jurors could reasonably find that the fifteen-foot cliff – the same one which petitioners allege should have been obvious to the landowners – was a hidden or concealed condition. In fact, petitioners present absolutely no evidence from which one could conclude that even the briefest inspection by the trespasser would not have led to a discovery of the cliff.

Second, in arguing that a jury issue should have precluded summary judgment, petitioners rely on cases that deal with a landowner's defense that the condition was open and obvious; this is an issue of contributory negligence, which by the Arizona Constitution, Article 18, § 5, is to be decided by the jury. *Markowitz v. Arizona Parks Bd.*, 706 P.2d 364 (1985). This is not the same issue that exists in the present matter, which is whether the landowners violated their duty owed to trespassers by failing to warn of a condition that was hidden or concealed. A determination of the alleged tort feasor's negligence is permitted under Rule 56 and is not reserved exclusively for the jury.

Petitioners make the additional error of failing to recognize the distinction between "open and obvious" and "hidden and concealed." Petitioners argue that the cliff was not open and obvious; this does not necessarily make it hidden and concealed. Petitioners have failed to set forth specific facts to create a genuine issue for trial on any claim that the cliff was hidden and concealed. The Ninth Circuit correctly affirmed summary judgment in favor of the respondent landowners.

CONCLUSION

For all the reasons previously stated, this case presents no issue appropriate for the exercise of this Court's jurisdiction. Accordingly, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 25th day of March, 1993.

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